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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 341

DAVID BURNET, Commissioner of Internal Revenue,
Petitioner,

vs.

CORONADA OIL & GAS COMPANY,
Respondent.

PETITION, BRIEF AND ARGUMENT FOR RESPONDENT

OSCAR E. CARLSTROM,
Attorney General of Illinois.

SVEINBJORN JOHNSON,
Counsel for the Board of Trustees of the University of Illinois.

Amici Curiae

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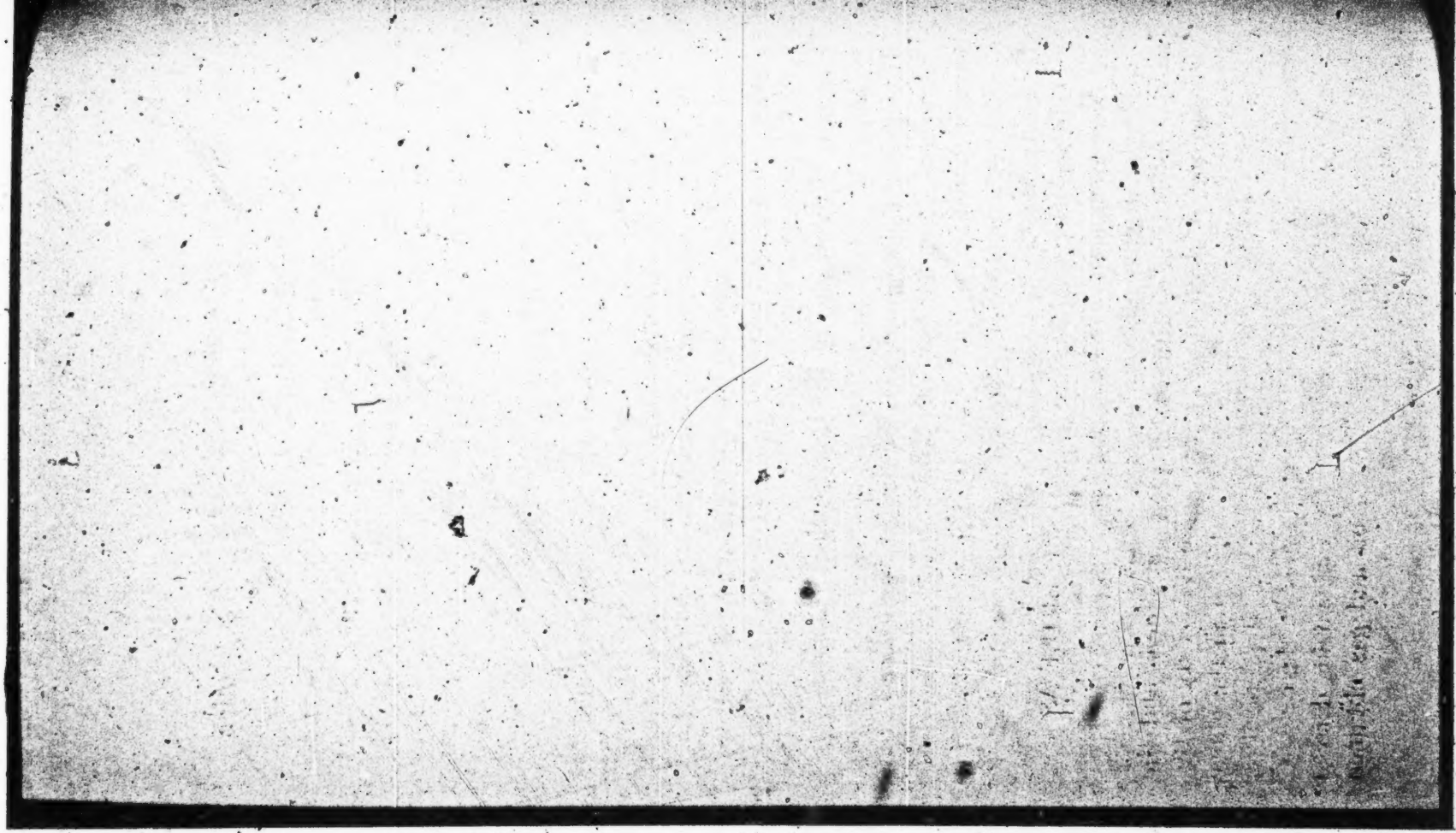

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PETITION, BRIEF AND ARGUMENT FOR RESPONDENT

PETITION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

The Attorney General of the State of Illinois and the Counsel for the Board of Trustees of the University of Illinois pray for leave to file the attached brief in the above entitled cause as *amici curiae* upon one legal proposition which may become of controlling importance in the case.

Whether the net income of the respondent derived through the sale of its share of the oil and gas obtained

from school lands leased from the State of Oklahoma during the years 1917, 1918 and 1919, is taxable income, may turn upon the answer to the fundamental question whether the state, in operating and maintaining a free public school system, is engaged in performing a strictly governmental function, within the principle which exempts from the federal taxing power the property, means, instrumentalities and agencies employed by the state in its essentially governmental activities. The question whether conducting educational institutions and activities of various kinds is proprietary or governmental is of tremendous importance to every state and governmental subdivision operating schools in the United States. It is a question which is not academic at this time, but which is pending, in one form or another, before two federal tribunals, the Board of Tax Appeals and the United States Court of Customs and Patent Appeals. Every state in the Union which operates a public school, whether of elementary or of college grade, is vitally concerned over the outcome of the contest between the United States Government, on the one hand, and certain state educational institutions, on the other, over the question whether the educational activities of the states belong in the proprietary or the governmental category. If they belong in the former, the consequences are far-reaching beyond comprehension at the present moment.

We submit the appended brief in support of this petition and in behalf of the legal proposition in which we are interested.

Respectfully submitted,

OSCAR E. CARLSTROM,
Attorney General of Illinois.

SVEINBJORN JOHNSON,
University Counsel, Board of Trustees, University of Illinois.

BRIEF OF AMICI CURIAE

The Legal Proposition

The *amici curiae* are interested in one legal proposition on which the decision of this case may turn. As we view the record, it is possible that this court may find it necessary to decide whether the State of Oklahoma, in maintaining and operating a public school system, is engaged in the performance of a strictly governmental function, within the principle which exempts from the operation of the federal taxing power the property, means, instrumentalities and agencies used by the state in its purely governmental activities.

While the Solicitor General and his associates do not explicitly contend that educational agencies are proprietary rather than governmental in character, their argument contains implications to that effect; and eminent counsel representing the United States in cases in other tribunals have urged and still urge that the public school is a proprietary institution. Marland v. United States, 53 F. (2d) 907, December, 1931, in the Court of Claims. The question is of grave importance to every state in the Union. In a case now pending in the United States Court of Customs and Patent Appeals, a dozen Attorneys General joined the State of Illinois in resisting the argument made by an Assistant Attorney General of the United States that conducting a state university was a proprietary function. The argument strikes directly at one of the few remaining, heretofore supposedly sovereign, rights of the states.

Preliminary Statement of Principles

As a groundwork for the main argument, it seems advisable to state certain principles so generally accepted that no extended reference to adjudicated cases is necessary.

I.

There is no power in the national government to tax, or impose direct burdens upon, or embarrass such instrumentalities or agencies of the states as are used in the performance of strictly governmental functions. That a like prohibition as against the states and in favor of the Federal Government exists, is equally a truism. Collector v. Day, 11 Wall. 113, 124.

II.

It has also been adjudged by the United States Supreme Court and has, indeed, become axiomatic, that this prohibition is none the less efficacious because implicit, rather than expressly stated, in the federal Constitution; for that which is implied is as much a part of the instrument as that which is expressed. South Carolina v. United States, 199 U. S. 437; Collector v. Day, supra; Clallam Co. v. United States Spruce Corporation, 263 U. S. 344.

III.

No grant of power in one part, notwithstanding it may be characterized judicially as paramount, can be exerted in violation of any fundamental right secured by other parts of the national Constitution. That is to say, no grant of power can be implied from the existence of another power, if the result of such implication be to destroy a right otherwise expressly or impliedly secured in the instrument. Adair v. United States, 208 U. S. 161, 180.

IV.

Inasmuch as there is an implied prohibition against action by the national government which tends to embarrass, burden or destroy the governmental agencies or instrumentalities of the states, a power to burden, tax, embarrass or destroy them cannot be implied from the specific grant of any

power. Any other conclusion would lead to inconsistency and the mutual cancellation of conceded powers and restrictions. The independence of the states, within their legitimate spheres of action, and the independence of the national government, in the exercise of the powers conferred upon it by the constitution, are basic concepts upon which the structure of the national government is in part rested and without which dual sovereignty in fact would be non-existent.

V.

The taxing power of the national government, in so far as there has been a grant of such power, is without limit; it may be exercised in such a manner as to "embarrass and destroy" the subject-matter of the tax, and the courts are powerless to give redress for that reason alone. Austin v. Alderman, 7 Wall. 694. This grant of power, nevertheless, like every other power granted the national government under the Constitution, is subject to the implied limit stated, namely, that it shall not be exercised so as directly to burden, embarrass, or destroy the governmental agencies or instrumentalities of the states. "The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words." Callam Co. v. United States Spruce Corporation, supra.

VI.

If the Oklahoma school system is, in the aggregate, an instrumentality of the State created for the more effective execution of a strictly governmental function (of providing the means of general education for the people of the state), then all property, and income of property, used for the purpose of carrying on schools is beyond the direct, as distinguished from remote and incidental, exertion of the federal taxing power, to any extent or in any degree.

These principles have often been affirmed, and, beyond a few landmarks in constitutional law, it is unnecessary to cite authorities. McCulloch v. Maryland, 4 Wheat. 316; Gibbons v. Ogden, 9 Wheat. 1; Texas v. White, 7 Wall. 700, 725; Collector v. Day, supra; United States v. Railroad Co., 17 Wall. 322; Veazie Bank v. Fenno, 8 Wall. 533; Railroad Co. v. Peniston, 18 Wall. 5; Panhandle Oil Co. v. Knox, 277 U. S. 218; Indian Motocycle Co. v. United States, 283 U. S. 570, 51 S. Ct. 601 (1931).

ARGUMENT

A

The Nature and Status of School Corporations

There is an important legal and historical distinction between state agencies engaged in educational work—the public school corporation—and the municipal corporation, proper. In the law the former have generally been regarded merely as administrative conveniences created by the state for the sole purpose of carrying on a governmental activity, and without any of the *corporate*, or proprietary, powers which historically, in Anglo-Saxon jurisprudence, have always belonged to the municipal corporation; the latter, on the other hand, in addition to its *strictly governmental* powers, has had, from the earliest times, extensive proprietary rights, with which came the capacity to sue and the liability to suit. Although the city has remained an agent of the state and subject to its control in certain strictly governmental particulars, its *corporate powers* have steadily expanded.

This expansion into "private business," to borrow a phrase from the United States Supreme Court, has not taken place in the case of the agencies or public corporations which the state has created for the purpose of operating its educational system. Whereas cities and villages are generally endowed with the power to furnish light, water and various other *proprietary* services to their citizens, public corporations of the class of school districts and universities have never been endowed with such or with analogous proprietary capacities. While they may and do hold title to property, they hold it in trust for the public and subject to the plenary control of the state legislature. The latter have been created and maintained for the sole and special purpose of carrying out a state

policy concerning education. From the standpoint of power and functions, these school corporations, proper, approximate more closely the county and the township, which, ordinarily, are not endowed with proprietary powers, save in the most limited degree.

Higher Education

The instrumentalities which the states have created for the purpose of operating universities, or institutions in which higher education is imparted, have generally been held to be public corporations, mere *instrumentalities* or *departments* of the state itself, created for greater convenience in exerting the state's sovereign power over the general field of education.

State v. Chase, 175 Minn. 259, 220 N. W. 951;
Regents v. Board, 4 Mich. 212, 227;
Regents v. Detroit, 13 Mich. 163;
Auditor v. Regents, 83 Mich. 467, 468;
47 N. W. 440, 10 L. R. A. 376;
Weinberg v. Regents, 97 Mich. 246;
Kansas v. Board of Regents, 29 L. R. A. 378, note 380;
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State v. Moore, 46 Nebr. 373, 64 N. W. 975;
Russell v. Purdue University, 201 Ind. 367, 168 N. E. 529, 65 A. L. R. 1384 (1929);
University v. Winston, 5 Stew. and P. (Ala.) 17;
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Head v. University, 47 Mo. 220;
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State v. Irvine, 14 Wyo. 318, 376, 84 P. 90;
McClain v. Regents, 124 Ore. 629, 265 P. 412;
In re Royer, 123 Cal. 614, 621, 56 P. 461;
Henn v. State University, 22 Ia. 185;
Phillips v. Virginia University, 87 Va. 472, 34 S. E. 66, 47 L. R. A. 284;
In re Thiel College, 216 Pa. 630, 66 A. 83;
Carrick v. Clark, 112 Tenn. 483, 80 S. W. 64;
State v. Clausen, 51 Wash. 548, 99 P. 748;
Ross v. Trustees, 31 Wyo. 464, 228 P. 642;
University v. Peoples Bank, 157 Tenn. 87 (1928).

In University v. Peoples Bank, supra, the court says:

"The University of Tennessee was not created for the benefit of a particular section of the state, and the property entrusted to it by the state is devoted to the use of the entire public, in the performance by the state of a governmental function."

Elementary Schools and Other Educational Agencies

The legal conclusion that boards or bodies charged with the duty of conducting institutions of higher learning, like universities, colleges and normal schools, are public corporations, as distinguished from the ordinary corporation, was the logical and necessary outgrowth of the state policy, adopted in some instances more than two centuries before

the Federal Constitution, that education, as stated by Marshall in the Dartmouth College case, "is a . . . proper subject of legislation." That the doctrine should be extended to other agencies created for the purpose of disseminating knowledge at state expense, or under state supervision and control, or both, was equally reasonable, and, in fact, imperative. The ruling rests upon the principle that education, in all its branches, from the primary schools to the university, from the technical school to the Colleges of Medicine and Law, is an enterprise which should at all times be conducted under the supervision of the state, and which the state itself may undertake. This principle forms the basis of the legal rule which, in a variety of situations, has resulted in judicial pronouncements either that the agency is not suable, or that it is not liable in tort, because it is a governmental instrumentality. It has been accordingly held that educational agencies of various kinds, such as agricultural or state fairs (Morrison v. MacLaren, 160 Wisc. 621, 152 N. W. 475, L. R. A. 1915 E 469, decided in 1915; Zoeller v. State Board of Agriculture, 163 Ky. 446, 173 S. W. 1143, decided in 1915; Minear v. State Board, 259 Ill. 549, 102 N. E. 1082, Ann. Cas. 1914 B 1290; Melvin v. State, 121 Cal. 16, 53 P. 416, decided in 1898; Hern v. Iowa, etc., Society, 91 Ia. 97, 58 N. W. 1092, decided in 1894; Berman v. Minn. etc., Soc., 93 Minn. 125, 100 N. W. 732, decided in 1904), state educational institutions (Abston v. Waldon Academy, 118 Tenn. 24, 102 S. W. 351, decided in 1906; Alabama School v. Reynolds, 113 Ala. 579, 42 So. 114, decided in 1905; Alabama School v. Adler, 114 Ala. 555, 42 So. 116, decided in 1905; Oklahoma College v. Willis, 6 Okla. 593, 52 P. 921, decided in 1898; Jorgens v. State, 2 Ct. Cl. (Ill.) 134, decided in 1911; Hale v. Williams, 10 N. S. Wales 638, decided in 1910), boards of education (Kinnare v. Chicago, 171 Ill. 332, 49 N. E. 536, decided in

1898; Daniels v. Board of Education, 191 Mich. 339, 158 N. W. 23, L. R. A. 1916 F 468; Board of Education v. Volk, 72 Ohio St. 469, 74 N. E. 646, decided in 1905; Wahrman v. Board, 187 N. Y. 331, 80 N. E. 192, decided in 1907; Jaked v. Board, 198 App. Div. 113, 189 N. Y. S. 697, decided in 1921; Herman v. Board, 234 N. Y. 196, 137 N. E. 24, decided in 1922; Hill v. Boston, 122 Mass. 344; Folk v. Milwaukee, 108 Wisc. 359, 84 N. W. 320; Sullivan v. School Dist., 179 Wisc. 502, 191 N. W. 1020; Anderson v. Board, 49 N. D. 181, 190 N. W. 806; Ferris v. Board, 122 Mich. 315; 81 N. W. 98, decided in 1899; Wixon v. Newport, 13 R. I. 454; Charles Bank v. Brainerd Dist., 49 Minn. 106, 51 N. W. 814; Ford v. Kendall Dist., 121 Pa. St. 543, 15 A. 812; State v. Frederick Co., 94 Md. 334, 51 A. 289; Curran v. Boston, 151 Mass. 505, 509, 24 N. E. 781), a school for children of the slums (Kellar v. Los Angeles, 179 Cal. 605, 178 P. 505, decided in 1919), and school districts (Wiest v. School Dist., 68 Ore. 474, 137 P. 749, 49 L. R. A. (N. S.) 1026, decided in 1914; Juul v. School Dist., 168 Wisc. 111, 169 N. W. 309, 9 A. L. R. 904, decided in 1918; Stovall v. School Dist., 110 Wash. 97, 188 P. 12, 9 A. L. R. 908, decided in 1920), are *public instrumentalities or public corporations*.

To sum up, then, these boards, public bodies and school districts have been held public agencies, or public corporations, endowed with a portion of the sovereignty of the state, not suable in tort, or not liable in tort, except when made so by statute, for the reason that they were exerting a portion of the state's sovereignty, imposed upon them by law, without expectation or hope of pecuniary profit, and in the public, or the general, as distinguished from the private, or local, interest. However unsatisfactory the grounds of decision, as they have been variously stated, may be, the principle is clear, namely, that agencies engaged in conducting

educational activities of the type mentioned, created by the state for that purpose and maintained by the state, in whole or in part, by taxes or by funds owned by the state, are public agencies or corporations and inherently partake, to no extent and in no degree of the character, the rights or liabilities of private corporations.

State ex rel. v. Chase, 175 Minn. 259, 262, 220 N. W. 951, holds that education is one of the ends of state government. The court says: "Education being one of those ends and the university the premier of the State's educational system, the system is, in the ordinary and functional sense, plainly an agency of the State."

Again; "It does not imply that the institution is not a mere instrumentality or agency of government in a functional sense." In Minnesota it is well established that the university is a state institution; that its governing board "is a public corporation, a trustee or agent of the state with specified and limited powers for use in a particular manner for a given end." Pp. 262, 263.

"The trustees of the University of Wyoming is a corporation created by statute as an agency of the state through which it manages the affairs of the state university." Fidelity Company v. Trustees, 16 F. (2d) 150.

"The University, though declared by statute to be body corporate by specified name, is not separate from or independent of the state, but is so much a dependent part of it that, even on a vesting of title in it of public lands of the state, the lands would still remain lands of the state." Amplifying the statement at pages 651 and 652 (226 Pacific), the court says: "and so far as the courts have passed upon the question of the relationship between the state and an educational institution created and maintained by it for a public purpose, the dependent position of the latter, as a mere state agency with respect to property or funds granted

to the state for the purposes of the institution, is well established." Ross v. Trustees, 31 Wyo. 464, 228 P. 642, Syllabus No. 12. Very specific on the same point is University v. Peoples Bank, 157 Tenn. 87, cited and quoted supra, p. 9.

B

"Governmental Functions"

When a public body or corporation is engaged in an activity under a duty imposed upon it by the sovereign, from which neither that corporation nor the sovereign expects, or in fact receives, financial or material profit; which is mainly supported either by general taxation or by property or funds, from whatever source derived, that are the absolute property of the agency or of the sovereign; which, in the light of customary and current opinion, is believed to bring benefits, tangible or intangible, to all the people in their collective and individual capacities; and which, as a governmental activity, is sanctioned by time, the course and usage of the government, and the unbroken and universal acquiescence of the people; that corporation is engaged in an activity of a strictly governmental character and there is a reciprocal prohibition, equally binding on the sovereign state and the National Government, against the exercise of the power of taxation by one upon the property which the other uses in the performance of the function.

1. *Governmental and proprietary functions of public corporations*

Public corporations possess two kinds of powers: ". . . . one governmental and public, and to the extent that they are held and exercised, is clothed with sovereignty—the other private, and to the extent that they are held and exercised, is a legal individual. The former are given and used for public purposes, the latter for private purposes. While in the exercise of the

former, the corporation is a municipal government, and while in the exercise of the latter, is a corporate, legal individual." Lloyd v. City of New York, 5 N. Y. 369, 374 (1851).

The attempt in tort cases to apply this doctrine in actual controversies has resulted in endless confusion. Nevertheless, the formula exists. In the field of torts the way out seems to be a legislative or judicial pronouncement that municipalities shall be liable in all cases, or in none. The majority of the courts have sought to distinguish the one type of activity from the other, but without laying down rules by which we may be guided in determining whether a particular activity is one or the other. Indeed, as said in the Lloyd case, supra, "All that can be done, with safety, is, to determine, as each case arises, under which class it falls."

The United States Supreme Court, in South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261, invoked this formula and held that an agent of the state, in conducting a liquor dispensary system, was performing a proprietary rather than a governmental function and was, accordingly, subject to the federal excise laws. This court did not define the phrase "private business," or suggest what activities are inherently governmental and what necessarily proprietary. The formula, in all its convenient—or inconvenient—vagueness, has been adopted, by this Court.

We are forced here, as indeed, in many situations, to reason from the analogies of the law. Some aid may be derived from a consideration of the grounds on which courts base their holding that an agency is not suable in tort, or that a tax is levied for a public purpose. In the cases denying the right to sue a municipality in a tort action it is sometimes urged as a reason for non-suability that no profit is derived or expected from the undertaking (Howard v. City, 153 Mass. 426, 77 N. E. 11; Lynch v. North Yakima, 37 Wash.

657, 80 P. 79), that no master-servant relationship exists, thereby rendering inapplicable the doctrine of respondeat superior (Abbott, Mun. Corp. Sec. 673; Dillon, Mun. Corp., 5th ed., Sec. 1655; Thompson, Com. on the Law of Negligence, Sec. 5796), and lastly—probably the true basis of the holding—that municipal corporations are agents of the sovereign, the *involuntary* character of the agency being emphasized (City v. Loy, 185 Ind. 18, 110 N. E. 694; Dillon, supra, 5th ed., Sec. 109), which itself is not liable to suit, and that it would, therefore, be a legal anomaly to hold the agent liable to private suit (Cooley, Torts, V. 2, 3rd ed. 1303 and cases cited).

No satisfactory differentiation between governmental and proprietary functions has been made in the tort cases. When a public corporation or agency is engaged in an activity, under a duty imposed upon it by the state (Denver v. Davis, 30 Colo. 370, 86 P. 1027; Markwardt v. Guthrie, 18 Okla. 32, 90 P. 26), from which neither it nor the state expects or, in fact, derives financial or material profit; which is mainly supported by general taxation (Welsh v. Rutland, 56 Vt. 288; Markwardt v. Guthrie, supra), or by funds which are the property of the state; which, in the light of customary and current opinion, is believed to bring benefits, whether tangible or intangible, to the people in their collective and individual capacities; and which, as a governmental activity, is sanctioned by time, the course and usage of the government, and the unbroken and universal acquiescence of the people (Topeka v. Loan Association, 20 Wall. 655, 22 L. ed. 455), that corporation or agency, we believe, is engaged in an activity strictly governmental in character, and there is a reciprocal prohibition, equally binding on the state and the nation, against the exercise of the power of taxation by one upon the property which the other uses in the performance of the function.

The author of this brief concedes that it is beyond his capacity to draft a definition which will adequately meet all cases. It is believed, however, that the syllabic paragraph, at the beginning of this section of the brief, though neither exclusive nor all inclusive, is a sound and correct statement of principle. There are certain services, which, through long experience and by common consent, have come to be looked upon as peculiarly within the province of government, and which, although private corporations may, to a limited degree, perform some of them, are, nevertheless, such that the public interest is deemed to be better served by having the activities either under the control of, or performed by the government itself. In this class it is believed belong such activities as law-making, the administration of justice and enforcing peace and order and obedience to the law, fire protection, the protection of the public health, and education of the citizens. There is substantial unanimity among the authorities in denying public liability in cases arising in these fields, on the ground that the function is governmental.

Is there any reason why an activity which is held governmental in the field of torts, should be held to be proprietary in the field of federal taxation? It is not perceived that any logical or reasonable basis for distinction exists. If a public corporation, created by the legislature and by it bound to operate a school, cannot be held liable in tort because it is a governmental agency of the state, the government in this case must accept the burden to show why the property of such a body, or the income of its agents, used in performing the duties laid on it by the law of the state, may be taxed by the United States because employed in a proprietary activity. The soundness or unsoundness of the distinction in tort cases is not here material. The formula has been imported into the law of federal taxation by the Supreme Court of the United States, and the government must suggest, or

else fail on this point, some rational basis for holding the activity proprietary in the case at bar, when state and federal courts have generally held the same activity governmental in the tort cases. In Coronado Oil Co. v. Burnet, 50 Fed. (2d) 998, it is assumed that education is a governmental function."

2. *Public support of higher education before 1787.*

Whether the school be of elementary or of college grade is immaterial upon the question whether the activity be governmental or proprietary. "The terms school, college and university convey the same idea, differing only in grade. Each indicates an institution of learning, consisting of trustees, teachers and scholars. . . ." State v. Erickson, 75 Mont. 429, 441, 244 P. 287.

In this subdivision, nevertheless, we shall deal mainly with higher education.

Before and at the time the thirteen original colonies ratified the Federal Constitution, it had been generally recognized that the maintenance and operation of schools of elementary and college grade at public expense was a proper and necessary state function; and several had definitely adopted the policy of maintaining seminaries and colleges at public expense. It is important to bear in mind that when the delegates assembled in Philadelphia in 1787, they, and especially the leaders among them, were thoroughly conversant with this colonial policy.

In 1780 Massachusetts adopted a Constitution, or form of government, for the Commonwealth. In section 1 of Article I of Chapter 5 of that instrument specific and emphatic acknowledgment is made of the fact that Harvard University had initiated many persons of great eminence into those arts and sciences which qualified them for public employment. In Chapter 5, Section 2, of the same document, it is said: "Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being neces-

sary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, *it shall be the duty of legislatures and magistrates,* in all future periods of this Commonwealth, *to cherish the interests of literature and the sciences,* and all seminaries of them; especially the University of Cambridge (as early as 1742 supported by public levies) public schools and grammar schools in the towns. . . ."

In the Constitution of Georgia, 1787, Article 54, it is said: "Schools shall be erected in each county, and supported at the general expense of the State as the legislature shall hereafter point out."

Connecticut, before it could erect a college of its own and before the Federal Constitution was ratified, contributed to the support of Harvard at Cambridge. Prior to 1718, what was to become Yale University was publicly supported in Connecticut. 11 C. J. 973, note. In the Constitution of 1818, Article VIII, section 2, we find the public school fund secured inviolably against encroachment or use for any other than educational purposes. This fund apparently antedated the Constitution of 1818.

In the Constitution of New Hampshire of 1784 we find this statement: "Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunities and advantages of education through the various parts of the county, being highly conducive to promote this end; it shall be the duty of the legislators and the magistrates, in all future periods of this Commonwealth to cherish the interests of literature and the sciences, and all seminaries and public schools . . . ."

In the Constitution of North Carolina, approved in 1776,

we find a similar provision, as apears from the ensuing quotation: "XLI. That a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged, and promoted, in one or more universities." The University of North Carolina was chartered in 1789 and opened its doors to students in 1795.

Virginia had, prior to the Revolution, made grants of public land and of public money for the support of education and particularly for the support of the College of William and Mary.

In New York, as early as 1784, the state had created a state board for educational purposes, known as the Board of Regents of the University of the State of New York, which body is still an important part of the governmental machinery of that State.

In Pennsylvania the Constitution adopted in 1776, Section 44, provides: "A school or schools shall be established in each county by the legislature for the convenient instruction of youth . . . and all useful learning shall be duly encouraged and promoted in one or more universities." And in the same state, Article VII, Section 1, Constitution of 1790, provides for free public schools and for one or more seminaries of learning.

Vermont came into the Union in 1790. In 1777 Vermont had adopted a Constitution in which it was provided: "One grammar school in each county and one university in this state, ought to be established by direction of the general assembly." In the Constitution of Vermont, adopted in 1786, it was asserted that a competent number of schools ought to be maintained in each town for the convenient instruction of youth and "one or more grammar schools be incorporated, and properly supported in each county of this state."

To refer again to the history of Virginia, Thomas Jefferson, in 1779, introduced into the Legislature of Virginia his famous bill for a more general diffusion of knowledge, which embodied a plan for a public school system in that state. And George Washington, in his First Message to Congress, in 1790, emphasized the importance of education as a means of maintaining the security of the newly adopted Constitution.

In 1782 the Legislature of Maryland founded a College at Chestertown. In the preamble the following appears:

> "Whereas institutions for the liberal education of youth in the principles of virtue, knowledge, and useful literature, are of the highest benefit to society, in order to raise up and perpetuate a succession of able and honest men for discharging the various offices and duties of the community, both civil and religious, with usefulness and reputation, and such institutions of learning have accordingly merited and received the attention and encouragement of the wisest and best regulated states . . . ." Act of 1782, Chapter 8.

In 1784 the Maryland Legislature founded the University of Maryland. In addition to the language of the Act of 1782, quoted supra, we find that body again expressing its opinion that education is a state matter. (Act of 1784, Chapter 37.)

The Federal Congress itself, has, from its very inception, recognized the fact that education is not only properly an activity for the states, but that control thereof is essentially and strictly a governmental function. Indeed, Congress has made the maintaining and operating of a state school system a condition of admission to the Union. The pronouncement in the Ordinance of 1787 is well known. It is there said that religion, morality and knowledge are necessary to *good government* and to the happiness of mankind, and that schools and the means of education "shall forever be encouraged."

In 1785, on May 20, Congress, at New York, passed an ordinance reserving section 15 in every township for the maintenance of "public schools within said township." Journals of Congress, May 20, 1785. A similar reservation was thereafter made in substantially all acts providing for the sale of public land. The schools thus supported were, of course, generally under state or public control. This Congressional policy has been continuous and consistent. Beginning with the Land Grant Act of 1826, Congress has repeatedly appropriated public property or funds to be used by the states in educational work. Other acts are the Land Grant Act of 1862, approved by President Lincoln; the Hatch Act of 1881; the Morrill Act of 1890; the Adams Act of 1906; the Nelson Act of 1907; the Smith-Lever Act of 1914; the Smith-Hughes Act of 1917; and the Purnell Act of 1925.

Attention is also called to a volume by E. W. Clews entitled "Educational Legislation and Administration of the Colonial Government," an authoritative historical work. Without going into detail, we are told that the Massachusetts Colony, fully one hundred years before the Constitution was adopted, expended public funds for the promotion of higher education; that in Connecticut, as early as 1715, public property and funds were appropriated for the advancement of college education; in New Hampshire, in 1693, and again in 1719, provision was made for the support of education through public taxation; and in Rhode Island, on February 17, 1764, the Legislature passed an act for the incorporation of the schools, in which it was averred, among other things, "Every wise and well regulated state" gives attention to the spread of knowledge among the people. This act pertained to *higher education*, as well as to the primary subjects. In New York, in 1764, Kings College was founded by a public act. In 1740 the City of Philadelphia appropri-

ated 1200 pounds, and one thousand pounds annually for a period of five years, for the support of an academy. In New York State likewise, as early as 1737, public funds were appropriated for the teaching of Latin, Greek, etc.

It thus appears that higher education was supported by general taxation in some colonies more than a century before the Constitution was adopted, a fact fully appreciated by the gentlemen who framed the Constitution in Philadelphia in 1787.

It is improbable that a single leader of the movement for independence or a single framer of the Federal Constitution, did not believe firmly in the imperative necessity, not only of widespread popular education, as afforded by the common schools, so-called, but in the need for seminaries, colleges and universities operated by the state at public expense for the dissemination of knowledge in the higher branches. The Federal Constitution is silent on the subject of a National University and upon the subject of education from no want of appreciation of its importance; the framers of that instrument came from states which had taken steps to maintain a school system at public expense, and they rejected the proposal to found a National University for the reason, as pointed out by Roger Sherman in a debate in Congress later (Farrand, Proc. Const. Convention. Vol. III, Appendix A, CCLV; p. 362), that it was deemed to be the peculiar concern of the states. At the time of the adoption of the instrument the states had taken definite steps in the direction of promoting popular and college education at general expense. *The power was consciously reserved by the states.* The conclusion seems to be inescapable that at the time of the adoption of the Federal Constitution in 1787 the conviction was general that education was essentially an interest of the states and control thereof a governmental function.

C.

Police Power and Education

1. *When the sovereign act is an exercise of the police power, the function is governmental in character. Normal School v. Charleston, 271 Ill. 602. Education is one of the purposes for which the police power may be exercised.*

That education is one of the purposes for which the police power may be exercised, is no longer open to doubt.

"But neither the Amendment (Fourteenth)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed the police power, to prescribe regulations to promote the health, peace, morals, *education*, and good order of the people . . . ." Barbier v. Connolly, 5 Sup. Ct. 357, 113 U. S. 31.

"Education is one of the purposes for which what is called the police power may be exercised. Massachusetts always has recognized it as one of the first objects of public care." Interstate Co. v. Massachusetts, 207 U. S. 79, 87, per Holmes, J.

"As a police regulation in the interest of *education*, the law may well require street railway companies to permit these children to ride to school upon their cars, without profit to the companies, provided it can be done without causing them loss." Com. v. Interst., etc., Ry. Co., 187 Mass. 436. Sustained by the Supreme Court, but on other grounds. Justice Holmes thinks it a proper exercise of the police power. If education were proprietary, such a requirement would obviously be illegal. The police power cannot be exercised by or for the peculiar benefit of private persons. See Owensboro, etc., Co. v. Todd, 91 Ky. 175, 5 S. W. 56, 11 L. R. A. 285; 43 C. J. 228, Notes 57-59.

2. *The power of the state to compel parents and guardians to send children to the public schools or to suitable substitutes for the public schools, cannot be vindicated upon any theory of education as a proprietary activity.*

The state may not *require all* children to attend the public schools. To do so is to infringe the guaranty of liberty found in the Fourteenth Amendment. Pierce v. Society, 268 U. S. 510, 45 S. Ct., 571 69 L. ed. 1070, 39 A. L. R. 468. This case and Meyer v. Nebraska, 262 U. S. 390, 67 L. ed. 1042, 29 A. L. R. 1446, settled the rule to be that while a state may require the attendance of pupils and the pursuit of certain courses, at *a* competent school, it cannot compel the pupil to attend *the public* schools. The state may compel *education somewhere,* but may not limit the right of the *citizen*-parent reasonably to choose the school where education is imparted. See State v. Hoyt (N. H.), 146 A. 170.

A statute which gives the juvenile court power to enforce rules of discipline in the public schools (such a holding would be improper, if the function were proprietary) is constitutional and proper. Bishop v. Houston, etc., Tex. Com. of Appeals, 29 S. W. 312 (1930).

State v. Bailey, 157 Ind. 324, 61 N. E. 734 (1901). The parent owes the duty to educate the child, not just to the child itself, but to the state. "The welfare of the child, and the best interests of society require that the state shall exert its sovereign authority to secure to the child the opportunity to acquire an education."

State v. Clottu, 33 Ind. 409, 411 (1870). "The matter of education is deemed a legitimate function of the state. . . ."

Farnum's petition, 51 N. H. 376, 378. The subject of education is one "of public concern, to be cherished, regulated and controlled by the state."

"The Federal Constitution does not provide for any gen-

eral system of education to be conducted and controlled by the National Government. It is distinctly a state affair." Piper v. Big Pine School Dist., 193 Cal. 664, 226 P. 926 (1924).

"No case has been cited by counsel, and none has been discovered by us, although we have searched the reports with care, which denies the doctrine that the regulation of the public schools is a state matter, exclusively within the domain of the Legislature." Clark v. Haworth, 122 Ind. 462, 7 L. R. A. 249, 23 N. E. 946.

"Free schooling furnished by the state is not so much a right granted to the pupils as a duty imposed upon them for the public good. If they do not voluntarily attend the schools provided for them, they may be compelled to do so. The object of the school laws is to guard against the dangers of incompetent citizenship." Fogg v. Board, 76 N. H. 296, 299, 82 A. 173, 175, 37 L. R. A. (N. S.) 1110, Ann. Cas. 1912 C 758. See Marland v. U. S. 53 F. (2d) 907, especially the opinion of Mr. Justice Littleton at page 910. ff.

If education were proprietary, like liquor, cotton, coal, electricity, water, or gas, it is obvious that while a public corporation might dispense all these commodities for the benefit of a local public, it could not compel the citizen either to use only the public product or a product of substantially equivalent quality.

Conclusion

The contention that conducting a school system is not a strictly governmental function finds support neither in legal logic nor in common experience. The law is much less the child of abstract reasoning than of the ordinary experience of ordinary persons. Legal logic detached from practical life is simply intellectual gymnastics. The law has been a steady growth, and one function of logic has been to relate or apply it to steadily changing human relations. As said by Justice

Holmes, "The life of the law has not been logic, it has been experience." Although cast in the mould of a written constitution, our political system was a distinct and novel experiment, and the mould must have elasticity or break under the pressure of actual trial. In the course of time it has turned out that the states have wholly controlled the course of education, to the exclusion of the Federal Government. It is too late to urge dictionary or abstract definitions of "government," or "governmental," or dry axioms or formal concepts of legal logic or political philosophy in order to support the sophism that managing a school is a proprietary business.

Ever since society took on definite form on this side of the Atlantic, the theory and practice of our people have recognized education as a fundamental concern of the state as a whole. Is not the combined judgment of all the state courts as to what is a governmental function virtually conclusive? When we recall the great diversity of judicial opinion in nearly every field of the law, the unanimity of the decisions on this point takes on a tremendous significance. In this instance, at least, if not in some others which perhaps might be cited, the courts have given expression to the inarticulate sentiment of the nation, from the days of its founders to the present hour, that general enlightenment is one of the first conditions of permanent and successful democratic government. Education everywhere concerns the state; but in a republic, where all ultimate power rests in the citizen, expressing his will through the instrumentality of a secret ballot, it is simply impossible to overestimate the importance of his bringing to the task of casting his ballot a large measure of cultivated intelligence and correct information. Ignorance and indifference are the two arch enemies of free institutions. Both can be routed if our public school system fulfills its promise. Next to the maintaining of order, nothing is of greater concern to the state, as a whole, nothing more

vitally affects the well-being of society organized on the democratic principle, than education. That this principle promotes national policy has heretofore been demonstrated; and of compelling emphasis is the action of Congress in requiring the States to maintain a school system as a condition of admission to the Union. See Marland v. United States, 53 F. (2d) 907 (1931).

At this point the natural result of the contrary position may be noted. If education be not a governmental function, the federal government has the power to tax every school district, the right to conduct a school, no matter of what grade, the property and income of every school district and university, the right to teach, and the income of every teacher, in the United States. The Congress may require every teacher in the United States to pay a license fee in any amount it sees fit, as it did in the case of the agent of South Carolina in the liquor dispensary case. And Congress may tax the agents and employees of every charitable institution in the land which collects, from those financially able, compensation for the services rendered. To put the matter bluntly, the power of the Federal Government to tax the educational agencies of the states is left without limitations save those which may be imposed by a want of ingenuity in Congress to enact laws.

Respectfully submitted,

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March, 1932.

Amici Curiae